PUI CHIAU TIEN

v.

FOI CHAW LEONG & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN JC
[COMPANIES (WINDING-UP) PETITION NO: 28-05-03-11]
17 OCTOBER 2003

COMPANY LAW: *Winding-up - Liquidation - Appointment of provisional liquidator - Undertaking as to damages - Description of property - Whether necessary prerequisites - Whether mandatory - Non-compliance thereof - Whether curable - Companies Act 1965 s. 231 - Companies (Winding-Up) Rules 1972 r. 35(2), 194(1)*

In this application to strike out an *ex parte* order of court appointing a provisional liquidator for the company ('the Order'), an argument was regurgitated that the Order was defective for not containing an undertaking as to damages in the event that a winding-up order was not granted, and further, for failing to sufficiently identify the assets of the company. Before the learned Judicial Commissioner, the petitioner retorted that the Order was valid as both s. 231 of the Companies Act 1965 ('the Act') and r. 35(2) of the Companies (Winding-up) Rules 1972 ('the Rules'), which governed the appointment of provisional liquidator, did not make the giving of such an undertaking mandatory. It was further argued that the Order could not be defective as there was nothing that showed that the court, in granting the Order, and dispensing with the undertaking, had wrongfully exercised its discretion.

Held:

[1] The undertaking in damages is not mandatory in an *ex parte* application though providing one is customary and in accord with general practice. As was said in *Re Highfield Commodities Ltd* [1985] 1 WLR 149, at p. 155 "the protection of the undertaking will be given where the company has had no opportunity of providing an answer or explanation to contentions which may prove to be wholly unfounded". (p 151 b-c)

[1a] The *ex parte* application here contains a clause to the effect that the petitioner undertakes to give the usual undertakings as to damages, if required by the court. As the court, in exercise of its discretion, did not so require, the absence of such undertaking does not invalidate the Order. (p 151 d)

[2] Rule 35(2) of the Rules required that the provisional liquidator shall state, firstly the nature and short description of the property of which he is to take possession, and secondly the duties to be performed by him. The word "shall" in the rule, indicates that the requirement is mandatory and any non-compliance thereof is not curable. (pp 151 f & 152 d-e)

[2a] The Order only contained the second requirement but not the first. That being so, the Order is void and invalid and such invalidity is not curable under r. 194(1) of the Rules. (p 152 e-f)

[Application allowed. Order set aside.]

Case(s) referred to:

Dato' Tan Toh Hua & Ors v. Tan Toh Hong & Ors [2001] 1 CLJ 740 CA ***(refd)***
Elias Mooin & Anor v. Dato' Zainal Abidin Johari [1997] 5 MLJ 359 ***(refd)***
Eveready Manufacturing (Pte) Ltd v. Explast Industries Sdn Bhd [1998] 5 CLJ 212 HC ***(refd)***
Kong Long Huat Chemicals Sdn Bhd v. Raylee Industries Sdn Bhd [1998] 5 CLJ 310 HC ***(refd)***
Ngoi Thiam Woh v. CTOS Sdn Bhd & Ors [2001] 4 CLJ 765 HC ***(refd)***
Pac Asian Services Pte Ltd v. European Asian Bank AG [1989] 3 MLJ 385 CA ***(refd)***
Re Highfield Commodities Ltd [1985] 1 WLR 149 ***(refd)***
Re Mainline Constructions (Qld) Pty Ltd [1975] Qd R 123 ***(refd)***
Re Pac-Asian Services Pte Ltd [1988] 1 MLJ 371 ***(refd)***
Zamrud Properties Sdn Bhd v. Pang Mooi Gaid & Anor [1999] 5 MLJ 180 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 231
Companies (Winding-Up) Rules 1972, rr. 35(2), 194(1)
Companies Act [Sing], s. 231
Companies Act 1948 [UK], s. 238
Insolvency Act 1986 [UK], s. 135
Singapore Winding-Up Rules 1972, form 11

Other source(s) referred to:

Atkin's Court Forms, 1981, 2nd edn, vol 10, p 234
Atkin's Encyclopaedia Of Court Forms In Civil Proceedings, 1999, 2nd edn, vol 10(1), p. 212
Palmer's Company Precedents, 1960, 17th edn, part 2, p 104
Paterson Ednie & Ford, *Australian Company Law*, 3rd edn, vol 4
Penguin English Dictionary, 3rd edn, p 828
The Shorter Oxford English Dictionary on Historical Principles, vol II, p 2549
Walter Woon and Andrew Hicks, *The Companies Act of Malaysia*, pp 130-160; 161-163B

For the petitioner - Tony Ling Lee Tom; M/s HC Lee & Co
For the 1st respondent - Allan PT Lao; M/s David Allan Sagah & Teng

Reported by WA Sharif

JUDGMENT

Lau Bee Lan JC:

This matter emanates from an application *vide* a Summons in Chambers dated 24 April 2003 by the 1st respondent for:

(a) the court order dated 8 April 2003 ("the Order") be set aside;

(b) costs of the application be awarded to the respondents. (encl. 14)

The learned counsel for the 1st respondent, Mr Allan PT Lao proposed that two preliminary issues of law be determined by the court to wit, it was not objected to by the learned counsel for the petitioner.

It is the contention of the 1st respondent that the order appointing the provisional liquidator is defective essentially on the grounds:

(a) the Order, granted pursuant to an *ex parte* application does not contain an 'undertaking' on the part of the petitioner to pay compensation or damages to the company and the 1st respondent in the event that the winding-up order is not granted by the court; and

(b) the Order fails to identify the assets of the company ie, non-compliance with r. 35(2) of the Companies (Winding-Up) Rules 1972.

To support his contention learned counsel relied on the following authorities:

(1) *Kong Long Huat Chemicals Sdn Bhd v. Raylee Industries Sdn Bhd* [1998] 5 CLJ 310 ("Kong Long Huat Chemicals");

(2) *Re Highfield Commodities Ltd* [1985] 1 WLR 149 (referred to in *Kong Long Huat Chemicals (supra)*;

(3) *Pac Asian Services Pte Ltd v. European Asian Bank AG* [1989] 3 MLJ 385;

(4) *Company Law* by Chan & Koh, pp. 9054 to 9059;

(5) *The Companies Act of Malaysia* by Walter Woon and Andrew Hicks, pp 130 to 160; 161 to 163B.

(6) Rule 35(2) of the Companies (Winding-Up) Rules 1972; and

(7) *Zamrud Properties Sdn Bhd v. Pang Mooi Gaid & Anor* [1999] 5 MLJ 180.

On the other hand, learned counsel for the petitioner, Mr Tony LT Ling contended that s. 231 of the Companies Act 1965 ("the Act") and r. 35(2) of the Companies (Winding-Up) Rules 1972 ("the Rules") governing the appointment of a provisional liquidator do not stipulate that the undertaking to pay damages on the part of the petitioner in the event that the court does not grant a winding-up order is mandatory, but discretionary; and therefore, as there is no evidence to show a wrong exercise of that discretion by the court, the Order is not defective. Learned counsel further contended that by virtue of para. (1)(a) at p. 2 of the Order which reads, *inter alia*:

> (a) To take possession and control of all the 2nd respondent's assets, moveable or otherwise ...,

that constitutes a short description of the property in accordance with r. 35(2) of the Rules.

In support of his arguments, the learned counsel cited the following authorities:

(1) *Eveready Manufacturing (Pte) Ltd v. Explast Industries Sdn Bhd* [1998] 5 CLJ 212;

(2) *Elias bin Mooin & Anor v. Dato' Zainal Abidin bin Johari* [1997] 5 MLJ 359;

(3) *Dato' Tan Toh Hua & Ors v. Tan Toh Hong & Ors* [2001] 1 CLJ 740 CA; and

(4) *Ngoi Thiam Woh v. CTOS Sdn Bhd & Ors* [2001] 4 CLJ 765.

Having considered the submissions of both the counsel I shall now deal with the issues.

Issue Of Undertaking As To Damages

His Lordship Abdul Malik Ishak J had deliberated on this issue. In the earlier case of *Eveready* decided on 27 November 1996, basically, his Lordship held that "s. 231 of the court and r. 35(1) of the Rules do not lay down the requirement that there must be an undertaking as to damages before the appointment of a provisional liquidator. It is entirely up to the court to specify whether the petitioner should give such an undertaking" (see "Held 4" of the case of *Eveready (supra)*.) However in *Kong Long Huat Chemicals (supra)*, decided on 2 June 1998, his Lordship held the view that the dictum of Sir Robert Megarry VC in *Re Highfield Commodities Ltd (supra*) at p. 155 to the following effect:

> ... First the general practice is to require an undertaking in damages if a provisional liquidator is appointed *ex parte*. Second, the general practice is not to require an undertaking in damages if the appointment is made inter

> partes. The distinction, I think, or a distinction, must be that the protection of the undertaking will be given where the company has had no opportunity of providing any answer or explanation to contentions which may prove to be wholly unfounded, whereas if the company has at least had the opportunity of being heard, the court will be making the appointment after considering what the company has said, if it has chosen to speak, and so can better assess the propriety of making the appointment.

is the correct statement of law. Premised on this, his Lordship stated, "that on an *ex parte* application, the applicant will be required to undertake and give an undertaking that if no order is made, he will compensate the company for any damages that may flow from the appointment". (see p. 325, para f to g).

It is to be noted that in *Re Highfield Commodities Ltd (supra)*, at p. 154, para E to F, Sir Robert Megarry VC had referred to *Palmer's Company Precedents*, 17th edn, (1960), Part 2, p. 104 and *Atkin's Court Forms*, 2nd edn, vol. 10 (1981) p. 234. In the former, two forms of an order appointing a provisional liquidator after the presentation of a winding-up petition and before the winding-up order has been made were addressed. One set, Form 77 does not contain an undertaking in damages by the applicant. The other form, Form 77a contains an undertaking in damages qualified with a note that "The undertaking in damages is not usually required if the company appears."

In the case of *Atkin's Court Forms*, it also contains an undertaking in damages with a reference to p. 84 wherein it is stated "The company should normally be made respondent to the summons, but in cases of extreme urgency an *ex parte* summons may be issued. In such an event the court will usually require the applicant to abide by any order which it may subsequently make as to damages which the company may sustain by reason of the appointment of the provisional liquidator".

Further, in UK, the current position with regard to the appointment of a provisional liquidator is governed by s. 135 of the Insolvency Act 1986, which is similar to s. 238 of the UK Companies Act 1948. It is to be noted that both these provisions are silent on the requirement of an undertaking in damages. However, again Form 140 in relation to the appointment of a provisional liquidator (adapted from the Insolvency Rules 1986), contains the usual clause as to undertaking in damages.

If a comparison is made of s. 231 of the Act (which is in para materia with s. 231 of the Singapore Companies Act (c.185)) with s.238 of the UK Companies Act 1948 and s. 135 of the Insolvency Act 1986, the provisions are similar wherein the key words present are:

(a) the court may at any time;

(b) appoint a liquidator provisionally or provisional liquidator;

(c) after presentation of a winding-up petition and before the making of a winding-up order; and

(d) the court may limit and restrict the powers of the liquidator by the order appointing him.

None of the provisions make mention about an undertaking in damages save for the reference to such an undertaking in the Forms referred to in Palmer's and Atkins. However in Malaysia, Form 13 referred to in r. 35(2) of the Rules (which is in *para materia* with Form 11 of the Singapore Winding-Up Rules 1972) is silent on the undertaking in damages by the applicant. Nevertheless in Singapore, the approach seems to be that in an *ex parte* application, the applicant will be required to undertake that if no order is made, he will compensate the company for any damages resulting from the appointment of the provisional liquidator (see *Pac Asian Services Pte Ltd v. European Asian Bank AG* [1989] 3 MLJ 385 at 392, para G and *Re Pac-Asian Services Pte Ltd* [1988] 1 MLJ 371, para H. Notwithstanding the inclusion of the usual undertaking, it is observed that in both cases, whether an *ex parte* application for the appointment of a provisional liquidator requires an undertaking as to damages or not was not an issue before the court.

It is also observed that the learned authors of the textbooks on company law (referred to by the learned counsel for the 1st respondent) in quoting the authorities of *Kong Long Huat Chemicals*, *Re Highfield Commodities Ltd and Pac Asian Services Pte Ltd (supra)*, stated that in respect of an *ex parte* application, "the applicant will be required to give a security or an undertaking that he will compensate the respondent for any damages that may flow from the appointment in the event no winding-up order is made" (see p. 9055) and "... the applicant will be required to undertake that if no order is made, he will compensate the company for any damages resulting from the appointment ..." (see p. X 162). The plain meaning of the word "will" is, *inter alia*, "resolve or habit" (see p. 828 of the Penguin English Dictionary, Third Edn.) or "expressing natural disposition to do something, and hence habitual action; habitually does; sometimes connoting 'may be expected to'" (see p. 2549, The *Shorter Oxford English Dictionary on Historical Principles*, vol. II).

The word "practice", *inter alia*, means "The habitual doing or carrying on of something; customary or constant action"; whilst the word "general", *inter alia*, means "pertaining in common to various persons or things applicable to each member of a class or genus; including only what is common to the individuals of a class" (see p. 1645, *The Shorter Oxford English Dictionary on Historical Principles*, vol. II.).

Thus, I am of the view that the term "the general practice" alluded to in the dictum of Sir Robert Megarry VC in *Re Highfield Commodities Ltd connotes* a customary course of action taken. Flowing from this, I surmise that is why the aforesaid learned company law authors have used the word "will" instead of "shall" or "must" which connotes something mandatory.

Having outlined the premise, I conclude that the undertaking in damages by the applicant is not mandatory in an *ex parte* application but it is customary and in accord with general practice to provide such an undertaking. The rationale for adopting such a practice is succinctly captured in the words of Sir Robert Megarry VC at p. 155 when he drew a distinction between an *ex parte* and *inter partes* application for the appointment of a provisional liquidator. In the case of the former, "the protection of the undertaking will be given where the company has had no opportunity of providing an answer or explanation to contentions which may prove to be wholly unfounded."

Further, as has been pointed out by the learned counsel for the petitioner, para 21 of the *ex parte* application (encl. 6) contains a clause to the effect that the petitioner undertakes to give the usual undertakings as to damages, if required by the Honourable Court. As the court in the exercise of its discretion did not so order the undertaking as to damages in the Order, it does not in any way invalidate the Order.

Issue Of Failure To Identify The Assets Of The Company Sufficiently

Rule 35(2) of the Rules stipulates "An order appointing a provisional liquidator in Form 13 shall state the nature and give a short description of the property of which the provisional liquidator is ordered to take possession and the duties to be performed by him."

In addition Form 13 itself, in its body contains the phrase "The nature and description of the property to take possession is as follows: ..."

Form 13 as was alluded to earlier is in para materia with Form 11 under the Singapore Winding-Up Rules 1972. In Form 53 and Form 140 of *Atkin's Court Forms*, 2nd edn, vol. 10 (1981) p. 234 and of *Atkin's Encyclopaedia Of Court Forms In Civil Proceedings*, 2nd edn, vol. 10(1) (1999) p. 212 respectively, there is a similar clause. In the former, the Form is worded "...[describe the acts which the provisional liquidator is to be authorised to do and the property of which he is to take possession ..." and in the latter Form, it is worded "[Here describe the acts which the provisional liquidator is to be authorised to do and the property which he is to take into his possession, e.g. the Provisional Liquidator do forthwith take into his possession the assets set forth in the attached schedule and that the same be realized by immediate sale at the respective price appearing in the column opposite the assets concerned ...]

There appears to be a dearth of authority to illustrate the point. No company law case was even cited by the learned counsel for the 1st respondent. The closest, I could find was the case of *Re Mainline Constructions (Qld) Pty Ltd* [1975] Qd R 123, where Dunn J held that "an order appointing a provisional liquidator must state the nature and give a short description of the property of which the provisional liquidator is ordered to take possession and the duties to be performed by him, as required by the Companies Rules 1963 (Qld) r. 51(2); a general reference to "the assets of the company " is not a sufficient description of the property". (see para [372/19], pp. 84, 107, *Australian Company Law*, Paterson Ednie & Ford, 3rd edn, vol. 4.) It is to be noted that the wordings of the winding-up rule in the said case is similar to r. 35(2) of the Rules in respect of the two limbs referred to in r. 35(2) and in Form 13 which must appear in the order appointing a provisional liquidator. They are:

(a) the nature and give a short description of the property of which the provisional liquidator is to take possession; and

(b) the duties to be performed by the provisional liquidator.

I agree with the learned counsel for the 1st respondent that the word "shall" in r. 35(2) indicates that the requirement is mandatory and any non-compliance is not curable. (See *Zamrud Properties (supra)*).

The Order only contained the 2nd requirement (see (b) above). Since the Order has failed to comply with the 1st requirement (see (a) above), I am of the view that the Order is void and invalid, the invalidity of which is not curable under r. 194(1) of the Rules. Hence, I rule that the Order be set aside with costs.